COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	D.T.E. 03-60

AT&T's RESPONSES TO THE DEPARTMENT'S BRIEFING QUESTIONS ON VERIZON'S OBLIGATIONS TO PROVIDE UNEs

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Table of Contents

Page

Page

Page

The Department has asked the parties to address a set of briefing questions concerning Verizon's obligations to provide certain unbundled network elements ("UNEs"), including mass market circuit switching, UNE-P, high capacity loops, and dedicated transport.[1] The answers to these questions by AT&T Communications of New England, Inc. ("AT&T") are set forth below. These answers are structured to match the order of the questions as posed by the Department. (An index setting forth which sections of this document respond to which of the Department's questions is attached at the end as an appendix.)

I. *USTA II* IN NO WAY RELIEVES VERIZON OF ITS FEDERAL LAW OBLIGATIONS TO PROVIDE MASS MARKET SWITCHING, UNE-P, HIGH-CAPACITY LOOPS, AND DEDICATED TRANSPORT, AND THE DEPARTMENT RETAINS THE FULL EXTENT OF ITS AUTHORITY UNDER BOTH FEDERAL AND MASSACHUSETTS LAW.

A. Verizon's Unbundling Obligations Under Federal Law Have Not Changed Because *USTA II* Does Not Change Federal Law.

Despite Verizon's attempts to create and exploit an illusion of uncertainty in the wake of the *USTA II* decision,[2] the D.C. Circuit's order has no effect on Verizon's obligations to provide mass market switching, UNE-P, high capacity loops and dedicated transport. *USTA II* did not make a finding of non-impairment and did not undermine the FCC's national finding of impairment, but rather, simply remanded to the FCC to reevaluate the method by which it made the national impairment finding. Significantly, nothing in *USTA II* precludes the FCC from reaching a conclusion that is nearly identical to the one it made in the FCC's *Triennial Review Order* ("*TRO*")[3] regarding the UNE obligations of incumbent local exchange carriers ("ILECs").

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[1] D.T.E. 03-60, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers*, Department Letter Request (June 15, 2004), at 2 and Attachment A.

[2] *United States Telecom Ass'n* v. *FCC*, 359 F.3d 554 (D.C. Cir. 2004).

[3] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*,

Thus, *USTA II* has not changed Verizon's UNE obligations under federal law. Verizon still must provide unbundled access to switching, loops, dedicated transport and UNE-P in accord with its existing interconnection agreements ("ICAs"), federal law, state law, and the Bell Atlantic/GTE merger conditions. Even Verizon has acknowledged that *USTA II* has no effect on its current unbundling obligations.

Verizon's counsel admitted to the D.C. Circuit that an order vacating portions of the *TRO* – which is all that it obtained, though it had sought far more – would not, by itself, terminate Verizon's obligation to provide unbundled switching and dedicated transport. In its Petition for Writ of Mandamus, Verizon asked the Court to vacate the FCC's unbundling rules and also sought an order directing the FCC to adopt, establish, and apply a new impairment standard within 45 days, as well as to provide for a "transition plan" that would do away with UNE-P if the FCC "fail[ed] to develop lawful rules" within that period.[4] Despite Verizon's request that the Court issue an order that it could stop providing unbundled switching if the FCC rules were vacated and not replaced with new unbundling rules, the Court *declined* to grant such relief.

During oral argument before the D.C. Circuit, Verizon's counsel conceded that if the only relief it obtained was the *vacatur* of some FCC unbundling rules, then it would be required to continue to provide all UNEs under its existing interconnection agreements at least until the FCC or the Court made a finding that CLECs were not impaired without access to particular elements. The admission was made during the following exchange:[5]

(continued...)
CC Docket No. 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," No. FCC 03-36 (released August 21, 2003).

[4] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Verizon's "Petition For Writ of Mandamus To Enforce the Mandate of This Court," filed August 28, 2003, at 30.

[5] *USTA v. FCC*, D.C. Circuit Nos. 00-1012, 00-1015, Transcript of Oral Argument, January 28, 2004, at 7-11 (emphasis added).

Judge Edwards: … Now, assume you're right on all of that and the conclusion is that [the FCC] cannot delegate [to the states]. Whatever else they can do – what's the remedy? …

Mr. Kellogg [counsel for Verizon]: The remedy is to remand to the FCC to vacate the decision or the parts of the decision that we challenge that allow such delegation and to direct the Commission to do what Congress and the courts told them to do, which is to make an impairment determination.

Judge Edwards: Where does that leave your clients, in your view, with respect to the precise matters that are at issue? … [D]o they remain in limbo? That is, do they remain as they are now? Do you assume impairment, no impairment, what? What are you imagining?

Mr. Kellogg: Well, it's a difficult question, Your Honor, because –

Judge Edwards: That's why I'm raising it.

Mr. Kellogg: -- we are subject, ***we are subject to a number of agreements in the states, and the states will continue to require us to provide elements pursuant to those agreements***.

Judge Edwards: ***Right.***

* * *

Mr. Kellogg: Until there is a law, the remedy is a lawful unbundling regime that–

Judge Williams: Yes, **but we don't have the authority to do that**, only the FCC can do that, so that question is, the question Judge Edwards is driving at and I'm interested in is if we agree with you on the delegation, do we say that the whole, that all the rules that are covered by the delegation are vacated effective 60 days after our decision or something like that[,] or what do we do?

Mr. Kellogg: Well, your honor, … we would urge the Court to provide a much more specific remedy. … We would ask the Court to impose strict guidelines on the Commission to reach a new and lawful unbundling decision. We would ask the Court to provide specific guidance, even more specific than provided in *USTA*, on the relevant factors going into that decision…. [A]nd we would ask the Court to direct the Commission to the extent that they cannot make a lawful impairment [finding], which we do not believe they can do in most markets for switching and transport, then they have to develop a prompt transition mechanism away from the artificial competition of the UNE-P to the sort of facilities-based competition that Congress envisioned.

Three points are noteworthy here. First, counsel for Verizon explicitly recognized that a *vacatur* does not, by itself, relieve it of its current obligations to provision UNEs. Second, Judges Edwards and Williams concurred in that evaluation. Third, while the Court's order vacated portions of the *Triennial Review Order*, the Court did *not* grant Verizon the remainder of the relief it sought: a ruling that by a date certain it could stop providing unbundled mass market switching and dedicated transport.

Critically, the Court did *not* rule that the FCC is precluded from finding that any of the currently provided UNEs must continue to be provided under the terms of 47 U.S.C. § 251. Rather, the Court only criticized the FCC's method for evaluating the evidence presented to it. Thus, the FCC remains fully authorized on remand to make virtually the same unbundling decisions that it made in the *TRO*.

As both the Court and counsel for Verizon recognized, *USTA II* does not, by itself, change the law in a fashion that relieves Verizon of its obligations to continue to provision UNEs. *USTA II* does not (and the Court recognized that it can not) impose the kind of "lawful unbundling regime" that Verizon and the other Bell operating companies ("BOCs") sought. All it could do – and all it did do – was to issue an order that vacated specific FCC rules and directed the FCC to review the matter consistent with the Court's rulings. Verizon's federal law unbundling obligations remain, utterly unaffected by *USTA II*.

B. Even If *USTA II* Constitutes a Change of Law, Which It Does Not, the Change of Law Provisions in Verizon's ICAs Require Verizon to Adhere to a Change of Law Procedure Before Any Adjustment to Its Unbundling Obligations Could Become Effective.

As discussed above, *USTA II* does not change the law, thus it does not trigger the change of law provisions in Verizon's ICA with AT&T. Regardless, if either Verizon or the Department wish to treat *USTA II* as a change of law, any changes in Verizon's UNE obligations could only be implemented in accord with the change of law provisions in its ICA. Under the current ICA, Verizon is expressly obligated to provide AT&T with unbundled loops, switching, dedicated transport, other UNEs, and combinations thereof, at TELRIC-compliant rates approved by the Department.[6] Verizon may not unilaterally cease complying with its obligations to provide UNEs based on its own position that the law has changed and no longer requires that it provide such UNEs. If Verizon believes that it has a basis under its interconnection agreements for obtaining a modification of its contract obligations, Verizon is contractually bound to follow the ICA procedures for obtaining those modifications.

AT&T's ICA provides that, "in the event that as a result of any decision, order or determination of any judicial or regulatory authority" Verizon is no longer required "to furnish any service or item or provide any benefit required to be furnished or provided to AT&T … then AT&T and [Verizon] shall promptly commence and conduct negotiations in good faith with a view toward agreeing to mutually acceptable new terms as may be required or permitted as a result of such decision, order or determination."[7] In addition, "[i]n the event that any legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement or the rights or obligations of either AT&T or [Verizon] hereunder … the Parties shall renegotiate in good faith such affected provisions with a view toward agreeing to acceptable new terms as may be required or permitted as a result of such legislative, regulatory, judicial or other legal action."[8]

Thus, as Verizon's appellate counsel before the D.C. Circuit recognized, the ICA procedure guarantees that disputed changes of law do not permit any party to make any precipitous and potentially disruptive unilateral modifications to local phone service (and

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6 *See, e.g.*, AT&T's ICA, Part II, Article 2; Teleport's ICA, Article 9; and ACC's ICA, Articles 15 & 16.

7 AT&T's ICA, General Terms and Conditions, Article 7.4; *see also* Teleport's ICA, Article 28.0; ACC's ICA, Article 35.0.

competition) based on its self-serving interpretation of “changed” law. The parties must first work together to try to agree on a contractual amendment that reflects any such change and only then, if unable to agree upon the scope or implementation of a change of law, the parties may seek assistance from the Department to resolve the dispute. In resolving the dispute, the Department will need to determine the scope of Verizon’s unbundling obligations under federal law in the absence of FCC guidance or rules, as well as the scope of Verizon’s unbundling obligations under Massachusetts law.

As discussed above, *USTA II* does not materially affect any material term of the existing ICAs, because nothing in *USTA II* constitutes a finding that Verizon has no obligation under either federal law or Massachusetts law to provide unbundled mass market switching and dedicated transport at TELRIC rates. *USTA II* does not address or provide an answer to the question of whether CLECs remain impaired in any particular area in the absence of access to UNEs and UNE combinations. It certainly draws no conclusions as to what obligations the ILECs have to provide UNEs and UNE combinations under Massachusetts law, which contains no “impairment” requirement. If, however, Verizon claims that *USTA II* materially affects a material term of the ICA, it is required to follow the process set out in the ICA to resolve the dispute. In sum, even if *USTA II* were a change of law, which it is not, under its ICAs, Verizon would not be permitted independently to alter its UNE obligations. Even giving effect to the change of law provisions, Verizon’s UNE obligations remain unchanged by *USTA II*.

(continued...)

[8] AT&T’s ICA, General Terms and Conditions, Article 7.3. *See also, e.g.*, Teleport’s ICA, Articles 29.20 and 29.21; ACC’s ICA Article 42.17.

C. After *USTA II,* the Department's Role Is to Apply Both Federal and State Law as Required by Federal Law.

1. Federal Law Authorizes the Department to Enforce the Unbundling Requirements Delineated in the Telecommunications Act.

USTA II does not – and cannot – abridge the Department's authority as established by the federal Telecommunications Act of 1996 ("Telecommunications Act" or "1996 Act"). It is clear under the Act that the Department has authority to direct Verizon regarding the availability and pricing of existing UNEs, and *USTA II* does nothing to preclude the Department's exercise of that authority. Several sections of the Telecommunications Act provide for Department authority to determine and impose UNE obligations.

Section 252 of the Telecommunications Act explicitly authorizes state commissions to implement the unbundling requirement contained in 47 U.S.C. § 251(c)(3). It charges state commissions with "ensur[ing]" that arbitrated agreements "meet the requirements of section 251 . . .*including* the regulations prescribed by the [FCC] pursuant to section 251. . .."; and it authorizes state commissions to reject any arbitrated agreement found not to "meet the requirements of section 251. . ., *including* the regulations prescribed by the [FCC] pursuant to section 251."[9] State commissions thus have authority to implement not just FCC regulations issued pursuant to Section 251, but also have authority to enforce Section 251 itself, including the unbundling requirement in 47 U.S.C. § 251(c)(3).

The Department has another obvious power under federal law: the power to interpret and enforce ICAs that it previously approved. The Department's power to enforce ICAs it has approved between Verizon and a CLEC is well established. "[T]he Act's grant to the state commissions of plenary authority to approve or disapprove … interconnection agreements

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9 47 U.S.C. § 252(c)(1), (e)(2)(B) (emphasis added).

necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved."[10] Since the power to interpret ICAs extends beyond the formation stage of interconnection agreements to enforcement, this power also necessarily includes the power to require Verizon to continue to offer services, such as UNEs, at the prices, terms, and conditions contracted for in existing ICAs.

Furthermore, state commissions are authorized to make unbundling determinations on issues that the FCC has not settled. The Act explicitly makes state commissions responsible for arbitrating all "open issues," 47 U.S.C. §252(c), which necessarily includes issues that are open because the FCC has not issued regulations which resolve them. The lack of FCC rules on unbundling, then, poses no barrier to Department action to resolve the open issue of UNE obligations.

The FCC has trumpeted the important role that state commissions have to play in maintaining stability and ultimately in enforcing the ILECs' continuing unbundling obligations. In its motion asking the D.C. Circuit to continue its stay of *USTA II*, the FCC emphasized the crucial role that state commissions must play in implementing the unbundling requirements of the Act. The FCC wrote: "As the United States Supreme Court has recognized, the local competition provisions of the 1996 Act create 'a hybrid jurisdictional scheme' in which the states participate extensively in the Act's implementation."[11] *USTA II* in no way limits – nor could it limit – Congress' express delegation of power to state commissions under the 1996 Act. Post-*USTA II*, the Department's federal law authority to interpret and enforce ICAs remains intact.

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[10] *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) *See also Michigan Bell Tel. Co.* v. *MCIMetro*, 323 F.3d 248, 356-57 (6th Cir. 2003); *BellSouth Telecom. Inc.* v. *MCIMetro*, 317 F.3d 1270, 1276 (11th Cir. 2003) (*en banc*).

[11] FCC's Motion for Stay, at 5 (quoting *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 489 (2002), and also citing *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 384 (1999)).

2. The Department Retains Full Authority Under Massachusetts Law to Impose Unbundling Obligations in Addition to Those Imposed by the FCC, Both in the Absence of Federal Rules, and Also Once the FCC Adopts New Rules.

Not only does the 1996 Act empower state commissions to approve and enforce the terms of negotiated and arbitrated ICAs, but it also authorizes state commissions to add unbundling and other obligations based on those commissions' state law authority. *USTA II* does not impact the Department's power under Massachusetts law – which is expressly reserved to it in the Telecommunications Act – to impose additional, consistent unbundling requirements in its review and approval of ICAs. Even if the FCC were to find that CLECs were not "impaired" without access to a particular element and thus that Verizon was not obligated under federal law to provide unbundled access to it, the Department would retain full authority to require unbundling of that element under Massachusetts law.

The 1996 Act expressly permits states to adopt and enforce pro-competitive measures that go beyond the requirements of federal law.[12] In fact, the FCC noted in its Motion to Stay[13] that the exercise of Department authority to require UNEs at TELRIC rates under Massachusetts law is not preempted by, and would be entirely consistent with, federal law. As the FCC stated, "[i]n the absence of binding federal rules, state commissions will be required to determine not only the effect of [the D.C. Circuit's] ruling on the terms of existing [interconnection] agreements but also the extent to which mass market switching and dedicated transport should remain available under state law."[14] Thus, especially in the absence of FCC rules, the Department can ensure the continued vitality of retail competition in Massachusetts by requiring

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[12] 47 U.S.C. § 253(e)(3).

[13] FCC's Motion to Stay, at 9.

[14] FCC's Motion to Stay, at 9.

Verizon to continue providing access to UNEs and UNE-P at rates reflecting forward-looking economic costs.

Furthermore, as discussed below, even if the FCC subsequently found that unbundling of a particular element was not required under federal law, the Department retains full authority to order the unbundling of that element at cost-based rates under Massachusetts law.

The 1996 Act specifically preserves the ability of states to impose state law requirements when reviewing interconnection agreements.[15] Congress preserved this state autonomy with only one qualification: a state Department may enforce or establish state law requirements "subject to section 253 of this title," § 252(e)(3), which prohibits states from imposing legal requirements that create barriers to competitive entry. Thus, so long as it does not invoke state law to create barriers to entry in violation of § 253 of the Act, a state may exercise its inherent sovereign power to regulate the terms of competitive access to local telephone networks.

In addition to the Department's role in reviewing and approving ICAs, two other, more general savings clauses further demonstrate that the 1996 Act envisions an active role for states to impose additional unbundling requirements that go beyond the minimum set of requirements, or floor, set by federal law. First, 47 U.S.C. § 261(c) provides that "[n]othing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the

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[15] The Act provides that "nothing in this section shall prohibit a State Department from establishing or enforcing other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). Section 252(e)(3) thus represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state Department action." *Puerto Rico Tel. Co.* v. *Telecom. Reg. Bd. of Puerto Rico*, 189 F.189 F.3d 1, 14 (1st Cir. 1999); *see also Southwestern Bell Tel.*, 208 F.3d at 481 (§ 252(e)(3) "obviously allows a state Department to consider requirements of state law when approving or rejecting interconnection agreements"); *AT&T Comms. of NJ* v. *Bell Atlantic-NJ, Inc.*, No. Civ. 97-CV-5762(KSH), 2000 WL 33951473, at *14 (D.N.J. June 6, 2000) ("§ 252(e)(3) gives states the authority to impose unbundling requirements beyond those mandated by FCC regulations.").

Department's regulations to implement this part." Second, Section 601(c) of the Telecommunications Act of 1996 establishes a special rule of construction for interpreting the Act. Congress specified that the Act "shall not be construed to modify, impair, or supersede . . . State[] or local law unless expressly so provided."[16]

In sum, the 1996 Act authorizes this Department to enforce federal law and to impose unbundling requirements under state law that go beyond what FCC regulations require. Federal regulation does not preempt the field unless it is so pervasive as to leave "no room" for parallel state requirements.[17] There is no field preemption here, where Congress explicitly reserved a role for states in regulating local telecommunications competition within the 1996 Act and states have adopted parallel regulatory requirements pursuant to that authority.[18] In the words of the Vermont Supreme Court, "the language of the 1996 Act compels the conclusion that Congress did not intend to occupy the field of telecommunications regulation, and that it took explicit steps to maintain the authority of state regulatory bodies to enforce and work within the Act."[19]

A Department determination that Verizon must continue to provision UNEs under state law is not at all inconsistent with either *USTA II* or any federal law. In *Southwestern Bell Tel. Co.* v. *Waller Creek Comms., Inc.*, 221 F.3d 812 (5th Cir. 2000), the Fifth Circuit confronted a challenge by Southwestern Bell to a Texas Public Utility Department decision ordering it to combine UNEs for a competitor. Southwestern Bell had argued that the decision was illegal because it had been based on an FCC regulation specifying when ILECs had to combine elements, which regulation had been vacated by the Eighth Circuit. The Fifth Circuit squarely

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16 P.L. 104-104 § 601(c)(1), 110 Stat. 56, 143 (1996).

17 *Hillsborough County, Florida* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713, 105 S.Ct. 2371, 2375 (1985).

18 *See id.*

rejected the argument: "Nothing in the Telecommunications Act forbids such combinations. Even if the Eighth Circuit's decision on this issue is correct – which we do not decide today – it does not hold that such arrangements are prohibited; rather, it only holds that they are not required by law." *Id.* at 821.

This conclusion, *i.e.*, that a state commission may impose network unbundling requirements that go beyond the scope of FCC rules because nothing in the 1996 Act prohibits it from doing so, was echoed by the Vermont Supreme Court. The Vermont decision quoted above affirmed an order by the Vermont Public Service Board (the "PSB") requiring Verizon to offer CLECs combinations of UNEs on a wholesale basis that were ordinarily combined and to resell voice mail as a telecommunications service.[20] In reaching this conclusion, the Vermont Supreme Court stressed that the PSB's order would be lawful even if "federal law does not require such combinations" of UNEs.[21] Because nothing in the 1996 Act *prohibits* an ILEC from offering the type of combined UNEs at issue, no conflict between federal and state law could exist.[22] Importantly, the Vermont Supreme Court noted that the 1996 Act "does not outline any limitations on state authority to regulate above and beyond the minimum requirements of the Act."[23] So long as Verizon or SBC is capable of complying with state and federal requirements simultaneously, state regulations are valid and not preempted by the 1996 Act.[24]

(continued...)

[19] *In re Petition of Verizon New England*, 173 Vt. 327, 795 A.2d 1196, 1200 (2002).

[20] *Id.*, 795 A.2d at 1204, 1207-08.

[21] *Id.*, at 1204.

[22] *Id.*

[23] *Id.* at 1204.

[24] *Id.* at 1204-1205.

The Connecticut Supreme Court similarly held that the Department of Public Utility Control may act under its state law authority to require an ILEC to offer an unbundled element at prices based on forward-looking economic cost, even where the ILEC is not required to do so by the FCC's rules. It found that "the department's exercise of [such] jurisdiction and authority pursuant to state law is ***consistent with*** the federal scheme."[25] As the Court explained:

> Even if we assume that [47 U.S.C.] § 251 cannot be construed to *authorize* the department to ensure reasonable and nondiscriminatory rates for network elements that are not necessary, there clearly is no language that expressly *prohibits* any action with respect to those elements. … Accordingly, we find nothing in the express language of the 1996 federal act that would preclude the department from regulating under state law … to protect the public's interest in affordable, high quality telecommunications service.[26]

The Maine Public Utilities Commission recently issued an order requiring Verizon to unbundle copper subloops that terminate on a pole or remote terminal box designated by the CLEC even though such unbundling is not required by federal law.[27] The Maine Commission noted with approval the Vermont Supreme Court's determination that federal law sets only a floor for unbundling and that states may impose additional consistent unbundling requirements.[28] It determined that requiring unbundling of copper subloops was not inconsistent with the 1996 Act, was technically feasible, and was in the public interest, and thus permissible.[29]

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[25] *Southern New England Telephone Company* v. *Department of Public Utility Control*, 261 Conn. 1, 36, 803 A.2d 879 (2002) (emphasis added).

[26] *Southern New England Telephone Company*, 261 Conn. at 36 (emphasis in original).

[27] Docket No. 2002-704, *Investigation of Skowhegan OnLine Inc.'s Proposal for UNE Loops*: ORDER, Part I (April 1, 2004).

[28] Docket No. 2002-704, *Investigation of Skowhegan OnLine Inc.'s Proposal for UNE Loops*: Addendum to Examiner's Report at 1 (February 17, 2004), at 12.

[29] *Id*. at 16-19.

In sum, it is well established that the exercise of the Department's authority under Massachusetts law requiring Verizon to provide particular UNEs is not preempted by, and is consistent with, federal law.

II. VERIZON'S OBLIGATIONS TO PROVIDE UNES ARE UNAFFECTED BY *USTA II* EVEN IN THE ABSENCE OF EFFECTIVE FEDERAL UNBUNDLING REGULATIONS UNDER 47 U.S.C. § 251.

A. The Department Has Broad Powers Under State Law to Ensure That Massachusetts Consumers Enjoy the Benefits of a Competitive Telecommunications Market.

"It is one of the happy incidents of the federal system," U.S. Supreme Court Justice Louis D. Brandeis wrote in 1932, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[30] While the promotion of competition within the local telecommunications market would hardly qualify as a novel experiment, its benefits already being realized in many corners of the United States, Brandeis's oft-quoted passage reaffirms the important role that states play in achieving progress toward important public policy goals.

The Department is clothed with a wide array of powers under state law to ensure continued progress toward the important public policy goal of sustainable competition within the local telecommunications market. States like Massachusetts, after all, were the first to recognize the benefits of local competition and institute policies meant to facilitate its growth -- long before the federal government decided to make local telecommunications competition a priority.

[30] *New State Ice Co.* v. *Liebmann*, 57 S.Ct. 371, 386-87 (1932) (Brandeis, J., dissenting).

1. The Department Has Long Recognized Its Authority Under State Law to Promote a Competitive Market for Local Telecommunications Services.

Since at least 1985, long before Congress passed the Telecommunications Act of 1996, the Department has made clear that it will exercise its authority to regulate telecommunications so as to promote effective competition for intrastate telecommunications services in Massachusetts.

The Department has broad authority to regulate the manner in which Verizon operates its local exchange network in Massachusetts, "including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith." G.L. c. 159, § 12(d). The Department has "general supervision" over telephone service in Massachusetts, "so far as may be necessary for the purpose of carrying out the provisions of law relative thereto."[31] The Department "may inquire into the rates, charges, regulations, practices, equipment and services of common carriers" to ensure that the rates are "just and reasonable."[32] In addition, the Department has broad powers to ensure that Verizon's "regulations or practices … affecting … rates" are not "unjust, unreasonable, unjustly discriminatory, [or] unduly preferential," including to Verizon itself.[33] Furthermore, Verizon's ability to make rules regarding the use of its network is "subject to the approval of the department and the requirement of reasonableness."[34]

The Department has repeatedly used these broad powers to foster competition for local telecommunications services. Indeed, the Department has correctly recognized that this broad

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[31] G.L. c. 159, § 12.

[32] G.L. c. 159 §§ 13,14.

[33] G.L. c. 159, § 14.

[34] *Wilkinson* v. *New England Telephone & Telegraph Co.*, 327 Mass. 132, 134 (1951).

authority includes the power to require Verizon to permit wholesale access to UNEs on competitively viable terms and conditions. Regulation of the wholesale provisioning and pricing of UNEs, a necessity for the continued growth of local competition, is well within the Department's powers under state law.

2. The Department's Decision in *Intra-LATA Competition* Recognized the Importance of State Regulation of Verizon's Network and Rates to Ensure Competitive Growth.

During a time of regulatory uncertainty similar to that present today, the Department forged pro-competitive policy goals under state law that continue to guide its regulation of telecommunications in Massachusetts. In its ground-breaking 1985 decision in *Intra-LATA Competition* (D.P.U. docket no. 1731), the Department, after an exhaustive analysis of the potential benefits of competition in post-divestiture intrastate telecommunications markets, found that local telecommunications competition would be superior to regulation as a means to achieving the important policy goals of economic efficiency and fairness.[35] The Department stated at that time that:

> [A] competitive market will better promote our telecommunications goal of economic efficiency by requiring, in the long term, that prices be based upon marginal costs, and that incentives will be created to minimize those costs in order to maintain and expand market share. In addition, the evidence indicates that fairness may be furthered through competition, because a competitive marketplace will require that prices for services be driven toward their economic costs, thus helping to ensure that service classes are not paying more than the cost of providing service to that class.[36]

In addition to identifying vibrant competition as a policy goal, the Department explicitly recognized that regulation of Verizon's (then New England Telephone's) network and costs

[35] *See Petition of the Attorney General for a Generic Adjudicatory Proceeding Concerning Intrastate Competition by Common Carriers in the Transmission of Intelligence by Electricity, Specifically with Respect to Intra-LATA Competition, and Related Issues*, D.P.U. 1731 at 25 (October 18, 1985).

[36] *Id.*

would be necessary to ensure sustained growth of competition within the local market. The Department correctly predicted that, after the introduction of competition "certain segments of the [telecommunications] market will become competitive or will exhibit competitive traits, while other market segments will maintain their monopoly characteristics."[37] While such conditions existed, it was "incumbent upon the Department . . . to ensure that ratepayers are protected from [] anticompetitive pricing practices."[38]

Allowing Verizon free reign to raise wholesale rates by ceasing to provision UNEs would open the door to the very anticompetitive behavior the Department first recognized, and sought to prevent, in 1985. Today's telecommunications market remains one of segmented competition, one in which the vast majority of mass market customers have yet to taste the benefits of competitive forces. In such an environment, giving Verizon greater control over its wholesale rates and offerings, which can then be used to leverage its position in the retail market, is clearly antithetical to the principles of *Intra-LATA Competition*.

3. The Policy Goals Articulated by *Intra-LATA Competition* Have Continued to Guide the Department Both Before and After the Passage of the 1996 Telecommunications Act.

Since 1985, the principles established by the Department in *Intra-LATA Competition* have guided its regulation of the telecommunications industry in Massachusetts. In a January, 1994 order issued in *Re New England Telephone* (D.P.U. 93-125), the Department again recognized its power under state law to regulate Verizon's network and rate structure to advance the development of competition in the Massachusetts intraLATA telecommunications market.[39] The Department explained that it "remain[ed] fully committed to achieving a rate structure for

[37] *Id.*

[38] *Id.*

[Verizon] that will enable greater competition in the telecommunications industry in Massachusetts so that the benefits of competition may accrue to the customers of [Verizon]."[40] In *In Re Nynex* (D.P.U. 94-50), the Department again restated in unequivocal terms its commitment to pursuing regulatory policies designed to advance the development of competition in the Massachusetts intraLATA telecommunications markets, and reaffirmed its adherence to the principle of regulatory oversight to ensure against exercise of monopoly power by Verizon (then NYNEX).

In January 1995, the Department began to explore ways to break the local telephone monopoly and bring competition to the market for local telecommunications services by opening an investigation into, among other issues, whether Verizon (then NYNEX) should be required to unbundle elements of its local network and lease them at wholesale rates to new entrants that would use them to provide competing retail services.[41] After enactment of the 1996 Act, the Department continued along this procompetitive path, overseeing the unbundling of Verizon's local network pursuant to federal law.

More recently, in the *Consolidated Arbitrations* dockets, the Department found that the refusal by Verizon (then Bell Atlantic) to provide the combination of UNEs known as UNE-P "would impair the successful introduction of competition in Massachusetts," and thus would be inconsistent with the Department's well-established policy "to create efficiency-enhancing conditions that would allow local exchange competition to develop and to deliver price and

(continued...)

39 *See Re New England Telephone and Telegraph Company*, D.P.U. 93-125 (January 13, 1994) at 9-10.

40 *Id.*

41 D.P.U. 94-185, "Vote to Open Investigation" at 3-5 (Jan. 6, 1995).

service benefits to customers."[42] Based on this finding, the Department "noted that [Verizon's] refusal to provide UNEs in a way that contributes to efficiency and in a manner conducive to the development of local exchange competition could raise a serious problem in the Department's review of any subsequent request by [Verizon for] approval to offer inter-LATA long distance service under Section 271 of the Act."[43]

In sum, the Department has repeatedly articulated its strong support for the development of competition in every segment of the telecommunication markets in Massachusetts, while recognizing its power under state law to regulate Verizon's local exchange network to ensure that new entrants do not face unreasonable barriers to entry. Any elimination or reduction of UNE availability at TELRIC rates would be fundamentally incompatible with the Department's long-established goal of eliminating barriers to intraLATA competition. The Department thus has the power under Massachusetts law to ensure the continued availability of UNEs at TELRIC rates.

B. The ***Intra-LATA Competition Decision*** Also Recognized That the Department May Impose State Law Obligations Upon Verizon as a "Carrier of Last Resort."

In *Intra-LATA Competition*, the Department also designated Verizon as a carrier of last resort with respect to local exchange services in Massachusetts.[44] The Department defined a carrier of last resort as a "carrier that will be required to continue service to a particular area or exchange, or to provide service to such an area or exchange, if a particular area or exchange is

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[42] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J Order at 2 (1999) (quoting from the Phase 4-E Order at 12-13. *See also Id.*, Phase 4-M Order at 2 (1999) (reiterating finding that Verizon's "refusal to provide such combinations would impair the successful introduction of competition in Massachusetts.")

[43] *Id.*, Phase 4-J Order at 3 (citing Phase 4-E Order at 13-15).

[44] *See Petition of the Attorney General for a Generic Adjudicatory Proceeding Concerning Intrastate Competition by Common Carriers in the Transmission of Intelligence by Electricity, Specifically with Respect to Intra-LATA Competition, and Related Issues*, D.P.U. 1731 (October 18, 1985).

either left without or not provided with telephone service."[45] While this language was principally concerned with ensuring universal telephone service to retail customers throughout Massachusetts, including in rural areas and in areas where interconnection technology lagged, its principles can and should be applied to wholesale consumers.[46] Indeed, the Department has already found that the recognition of a carrier of last resort remains a necessary concept even in an environment where some degree of wholesale competition exists.[47] Given that Verizon is the only carrier capable of providing access to UNEs throughout large portions of Massachusetts, it in fact serves as a carrier of last resort for wholesale customers. Even in the absence of effective federal unbundling requirements, therefore, Verizon should remain obligated to provide UNEs because it is the carrier of last resort for such services.

C. Eliminating UNEs at TELRIC-Compliant Rates Would Also Violate Verizon's Alternative Regulation Plan.

Any elimination or reduction of Verizon's unbundling obligations would be inconsistent with the premise underlying the pricing flexibility won by Verizon in its new Alternative Regulation Plan. The Department would be well within its authority to continue Verizon's unbundling obligations as required under the Department's orders in Docket 01-31.

In Docket 01-31, Verizon successfully argued that it should be given unlimited upward pricing flexibility for its retail service offerings to business customers. To achieve this result, Verizon represented that "the ability to lease UNEs allows CLECs to increase or decrease their supply of telecommunications services at will in response to price changes by Verizon or any other market conditions," and that as a result it cannot freely exercise any market power in

[45] D.P.U. 1731 at 71.

[46] D.P.U. 1731 at 71.

providing retail services.[48] With respect to retail business services, the Department agreed. It found that traditional rate of return regulation was no longer necessary "for those retail business services that CLECs can compete against with their own UNE-based retail services."[49] The Department limited Verizon's pricing flexibility to those retail services that were competitive on a UNE basis.[50] The Department found that "by leasing UNEs, CLECs can enter the market with the same costs as Verizon (the incumbent firm), one of the two prerequisites for a market to be contestable…."[51]

If UNEs priced at TELRIC standard were no longer available to CLECs, large portions of the Massachusetts telecommunications market would no longer be "contestable." The competitive environment that the Department found necessary to permit Verizon increased retail pricing flexibility would largely cease to exist.

Indeed, given the position Verizon took in Docket 01-31, namely that CLECs could continue to use UNE-P to contest the market for retail business services, it should not be permitted to reap the benefits of the pricing flexibility it achieved in that docket while disavowing the position it took regarding the continued availability of UNE-based competition.

(continued...)

[47] *See In Re Pricing and Rate-making Treatment For New Electric Generating Facilities Which Are Not Qualifying Facilities,* D.P.U. 86-36-C (May 12, 1988).

[48] *See Investigation by the Department on its Own Motion into the Appropriate Regulatory Plan to Succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts,* D.T.E. Docket No. 01-31, Phase I Order at 39 (May 8, 2002).

[49] D.T.E. 01-31-Phase I, at 89.

[50] D.T.E. 01-31-Phase I, at 91.

[51] D.T.E. 01-31-Phase I, at 59-60.

Verizon should be estopped in this docket from seeking to take away the ability of CLECs to use UNE-P to contest Verizon's offering of retail business services in Massachusetts.[52]

Any claim by Verizon that enforcement of its Alternative Regulation Plan, including its clear commitment to continue to provide UNEs and UNE combinations as the quid pro quo for receiving full upward pricing flexibility on its retail business services, is preempted by the *USTA II* decision or other federal law would be without merit. AT&T has previously demonstrated that the Department retains full authority under Massachusetts law to impose unbundling requirements in addition to those imposed under federal law, and that such state law power has not been preempted.[53] But enforcement of Verizon's voluntary commitments under its Alternative Regulation Plan is even easier. As the Department found in the *Consolidated Arbitrations* docket, even if it were not prepared to impose additional unbundling requirements under Massachusetts law (which it has the full power to do) it need not hesitate to order Verizon to comply with a voluntary commitment to keep providing certain UNEs or UNE combinations.[54] Furthermore, enforcement of the obligations that Verizon must meet as a condition of its retail rate flexibility under its Alternative Regulation Plan, including its obligation to keep providing UNEs and UNE combinations at TELRIC-based rates, falls within

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[52] *See Niles-Robinson v. Brigham and Women's Hospital*, 47 Mass. App. Ct. 203, 206-207 (1999) (barring plaintiff under the doctrine of judicial estoppel from asserting in her civil action a position contrary and inconsistent to the position she took before the Department of Industrial Accidents with respect to applicability of the workers' compensation act to her physical condition). *See also Fay v. Federal Nat. Mortg. Ass'n*, 419 Mass. 782, 787 (1995) ("Judicial estoppel, or 'preclusion of inconsistent positions,' is an equitable doctrine which precludes a party from asserting a position in one legal proceeding which is contrary to a position it has already asserted in another.").

[53] *See* "AT&T's Emergency Motion For An Order To Protect Consumers By Preserving Local Exchange Market Stability," filed in Docket D.T.E. 03-60 on May 28, 2004, at 19-25, which AT&T incorporates herein by reference.

[54] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94-Phase 4-J Order at 9-10, and Phase 4-M Order at 9 (1999).

the Department's exercise of its traditional intrastate retail ratemaking authority, which is expressly protected from preemption by 47 U.S.C. § 152(b).

D. In Order to Prevent Unlawful Discrimination Under Both Federal and State Law, Verizon Must File for Department Approval Individual Agreements for the Provision of Mass Market Switching and Other Network Elements in Massachusetts.

In order to prevent unlawful discrimination, both 47 U.S.C. § 271 and the Department's decision in D.P.U. 90-24 require Verizon to file for Department approval agreements for the provision of mass market switching and of other network elements. First, independent of any impairment determination pursuant to 47 U.S.C. § 251, Verizon's authority to provide in-region long distance service in Massachusetts is expressly conditioned upon its non-discriminatory provision to its competitors of essential network elements and services contained in 47 U.S.C. § 271(c)(2)(B)'s competitive checklist, including local switching; failure to continue providing these elements and services risks revocation of that Section 271 authority.[55] As is explained below, Verizon must offer competitive checklist items pursuant to "binding *agreements that have been approved under section 252*[.]"[56] Second, as is also explained below, the Department's decision in D.P.U. 90-24 requires Verizon to file with the Department each and every agreement it reaches to provide mass market switching.

1. In Order to Continue to Satisfy Section 271, Verizon Must File for Department Approval Any Agreement Pursuant to Which It Offers Mass Market Switching and Other Competitive Checklist Items.

47 U.S.C. § 271(c)(2)(A) establishes the requirements by which a BOC may be authorized to offer in-region long distance service, one of which requirements is the filing and approval of interconnection agreements under Section 252. It states:

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55 47 U.S.C. § 271(d)(6)(A)(iii).

56 47 U.S.C. § 271(c)(1)(A) (emphasis added).

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i) **(I)** such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A),

or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B),

and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

Significantly, Section 271(c)(2)(A) is written in the present tense. At any given moment, Verizon is qualified to provide long-distance service only if it is complying with two essential requirements: (1) "access and interconnection" must be offered "pursuant to one or more agreements described in [Section 271(c)](1)(A)"[57] and (2) such "access and interconnection" must include the checklist items specified in subparagraph (B).[58]

The agreements described in Section 271(c)(1)(A) that constitute a requirement for Verizon's authority to offer in-region long distance service are interconnection agreements approved under Section 252. Section 271(c)(1)(A) states:

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought

57 47 U.S.C. § 271(c)(2)(A)(i)(I). Alternatively, under (c)(2)(A)(i)(II) such "access and interconnection" can be provided pursuant to a statement of generally available terms (SGAT) where no request for access and interconnection is made, but this option does not apply in Massachusetts.

58 47 U.S.C. § 271(c)(2)(A)(ii).

> (A) Presence of a facilities-based competitor
>
> A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding *agreements that have been approved under section 252* of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers.[59]

The agreements under which Verizon must offer mass market switching to requesting carriers, therefore, must be agreements that are filed with the Department and approved pursuant to Section 252.

The FCC has already addressed BOC attempts to evade the disclosure, review and opt-in protections of Section 252. Specifically, Qwest attempted to end-run section 252 by requesting from the FCC a declaratory ruling that section 271 network elements were not required to be provided in filed interconnection agreements.[60] The FCC rejected Qwest's request, determining that Section 252 creates a broad obligation to file agreements, subject to specific narrow exceptions that do not exempt Section 271 elements. In the *Qwest Declaratory Ruling*, the FCC made clear that any agreement addressing *ongoing* obligations pertaining to unbundled network elements – and the access and unbundling obligations of Section 271 fall squarely within that definition – must be filed in interconnection agreements subject to Section 252 and also that, to the extent any question remains regarding those obligations, the state commissions are to decide the issue.

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59 47 U.S.C. § 271(c)(1)(A) (emphasis added). Subparagraph (B) of § 271(c)(1) does not apply in Massachusetts because it applies only where no request for access or interconnection is made.

60 Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1), WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) ("*Qwest Declaratory Ruling*").

Further, the FCC has also always recognized that it is essential that Bells demonstrate compliance with Section 271 through binding and lawful Section 252 interconnection agreements containing specific terms and conditions implementing the competitive checklist. Thus, the FCC has dismissed Section 271 applications and has found that a Bell failed to comply with the checklist if, for example, it relies on an agreement that is not in fact binding and is not approved by a state commission.[61] The FCC has also made clear that when a competitive LEC requests a particular checklist item, a Bell "is providing" that item and is complying with Section 271(c)(2)(A) only if it has a "concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements* that set forth prices and other terms and conditions."[62]

Accordingly, in addition to its duty to negotiate found in Section 251(c)(1), Verizon – having volunteered to meet the conditions required of a BOC that seeks to provide interLATA services – is also obligated by Section 271 to negotiate and (if necessary) arbitrate the particular terms and conditions of each of the Section 271 competitive checklist items that CLECs request, which items – to reiterate – include mass market switching. If Verizon refuses to do so and thus does not enter into binding interconnection agreements *under Section 252* regarding mass market switching and the other competitive checklist itmes, then Verizon would plainly have "cease[d] to meet" one of the essential conditions of § 271,[63] namely, an "agreement[] that has been approved under section 252[.]"[64]

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[61] *See, e.g.*, *Application of Ameritech Michigan*, 12 FCC Rcd. 3309, ¶ 22 (1997); *see also Michigan 271 Order*, 12 FCC Rcd. 20543, ¶ 25, 71 (1997).

[62] *Michigan 271 Order* ¶ 56 (emphasis added).

[63] § 271(d)(6)

[64] *See* § 271(c)(2)(A) ("Agreement *required*") (emphasis added).

2. Agreements Governing Terms of Carrier Access or Interconnection Must Be Filed With the Department Under D.P.U. 90-24 and G.L. c. 159, §§ 14, and 19, Whether or Not Such Agreements Purport to Satisfy Section 271 Obligations, So That the Department Can Ensure That Verizon Does Not Engage in Unlawful Discrimination.

The Department has a statutory obligation to ensure that Verizon is not discriminating unfairly among its wholesale or retail customers. It cannot carry out that mandate unless it requires Verizon to file and permit full review of intercarrier interconnection agreements. Such a requirement is consistent with the Department's ruling in D.P.U. 90-24.[65] In that docket, the Department succinctly stated the basic requirements of G.L. c. 159, §§ 14 and 19:

> G.L. c. 159, § 14 prohibits a common carrier from charging rates or having regulations or practices that are "unjustly discriminatory" or "unduly preferential." G.L. c. 159, § 19 prohibits any common carrier from charging a rate that is not filed with the Department in a published schedule, and also prohibits a common carrier from directly or indirectly giving a reduced rate or other "privilege" to any person or corporation unless such rate or privilege is contained in the carrier's published schedule and is "regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service." Other provisions in G.L. c. 159 reinforce these concepts. *See*, G.L. c. 159, §§ 1 and 16.[66]

In D.P.U. 90-24, the Department considered a proposed tariff provision under which AT&T could offer telecommunications services to individual customers on terms and conditions and at rates that were not specified in the tariff but instead established on a case-by-case basis in

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65 *AT&T Communications of New England, Inc.*, D.P.U. 90-24 (January 10, 1991).

66 D.P.U. 90-24, at 16-17. G.L. c. 159, § 16, states in pertinent part:

> If the department is of opinion, after a hearing had upon its own motion or upon complaint, that the regulations, practices, equipment, appliances or service of any common carrier are unjust, unreasonable, unsafe, improper or inadequate, the department shall determine the just, reasonable, safe, adequate and proper regulations and practices thereafter to be in force and to be observed, and the equipment, appliances and service thereafter to be used, and shall fix and prescribe the same by order to be served upon every common carrier to be bound thereby.

The Department relied upon G.L. c. 159, § 16, to investigate the appropriate terms and condition of collocation arrangements that Verizon provides to competing carriers. *See Vote to Open Investigation*, D.T.E. 02-8 (January 24, 2002).

response to competitive bidding, in so-called "Special Pricing Arrangements" or "SPAs."[67] The question presented was whether such a proposed tariff satisfies the statutory requirements that rates, terms, and conditions must be on file and that such rates, terms, and conditions must not be unduly discriminatory.

The Department found that the SPA tariff satisfied the filing requirements of G.L. c. 159, § 19, because – by the terms of the tariff – the rates, terms, and conditions of the individual customer offering would be filed with the Department. The Department also found that the SPA on its face did not constitute the offering of services on unduly discriminatory terms because it called for competitive bidding, and because the specific rates, terms, and conditions would be determined and filed only after a customer-specific agreement was reached.[68] In order for the Department to ensure compliance with the non-discrimination requirements of c. 159, § 14, the Department set forth specific filing requirements, which included a requirement that the carrier provide a "copy of the contract and all documents incorporated therein," as well as information related to the competitiveness of the offering and cost justification.[69]

The statutory filing requirement and prohibition against discrimination apply no less to the circumstances contemplated by the Department's question, *i.e.*, Verizon's offering of mass market switching to telecommunications carriers, than to the circumstances of D.P.U. 90-24. The filing requirement, in fact, applies even more strongly, for under the circumstances currently being contemplated, the Department does not even have the comfort of "competitive bidding" upon which to rely to determine whether the non-discrimination requirements of Section 14 have been satisfied by a mass market switching offering to an individual carrier. It was certainly

[67] D.P.U. 90-24, at 1.

[68] D.P.U. 90-24, at 18-19.

never established in the "impairment" phase of this docket that carriers requiring mass market switching have alternatives to which they can turn, and with which Verizon would be in competition, for the provision of mass market switching. Thus, *a fortiori*, the only basis upon which the Department can determine whether Verizon is satisfying its non-discrimination obligations under Section 14 is the requirement that Verizon file with the Department each agreement to provide mass market switching into which it enters.

In any event, G.L. c. 159, § 19 simply requires such a filing: it "prohibits any common carrier from charging a rate that is not filed with the Department." This statutory filing requirement is a practical mechanism for ensuring that a carrier's services are "regularly and uniformly extended to all persons and corporations under like circumstances for the like, or substantially similar, service." *Id.*

Both the prohibition against discrimination and the disclosure mechanism are consistent with the anti-discrimination purposes of similar filing requirements under both federal law and the laws of other states. Federal law ties a BOC's Section 271 privilege to offer in-region long distance service to the provision of essential checklist items that must be provided in accordance with Section 252 interconnection agreements subject to express nondiscrimination requirements *enforced by the states*. As the FCC noted, state review of interconnection agreements is vital because absent such review, "the nondiscriminatory, pro-competition purpose of section 252(i) would be defeated."[70] This view is consistent with long-standing FCC policy. The FCC noted in its initial *Local Competition Order* that:

(continued...)

[69] D.P.U. 90-24, at 22.

[70] *Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, March 12, 2004, ¶ 20 (footnotes omitted).

> [R]equiring filing of all interconnection agreements best promotes Congress's stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should have the opportunity to review *all* agreements . . . to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest.[71]

Other states have also recognized the need for the filing of interconnection agreements to ensure that nondiscrimination requirements of state law are satisfied. Indeed, on April 28, 2004, the Michigan Public Service Commission ("MPSC") ordered BOC SBC and Sage Telecom, Inc. to file their recently negotiated agreement for the provision of telecommunications services by May 5, 2004.[72] The MPSC's order rested on both federal and state law grounds. The MPSC found that "[p]ursuant to [47 U.S.C. §] 252(a) and (e), interconnection agreements arrived at through negotiations must be filed with and approved by this Commission."[73] In addition, it determined that "[t]he Commission's authority to exercise its jurisdiction of the SBC/Sage agreement at issue is not limited to [the 1996 Act]." The MPSC found that state law prohibited discrimination in the provision of certain telecommunications services[74] and stated: "[i]n order for the Commission to perform these statutory duties, the SBC/Sage agreement must be formally filed with the Commission for its consideration."[75] Similarly, the Texas Public Utility

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[71] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15583, 167 (1996) (subsequent history omitted, emphasis in original) ("*Local Competition Order*").

[72] *In the matter, on the Commission's Own Motion, to Require SBC Communications, Inc. and Sage Telecom, Inc. to Submit Their Recently Negotiated Agreement for the Provision of Telecommunications Services in Michigan for Review and Approval*, Order, Case No. U-14121 (April 28, 2004).

[73] *Id.*, at 1.

[74] *Id.*, at 2.

[75] *Id.*, at 3 (footnote omitted).

Commission required SBC and Sage to file their agreement in that state,[76] as have the Indiana Utility Regulatory Commission[77] and the Wisconsin Public Service Commission.[78]

3. In Order to Prevent Discrimination, Pursuant to 47 U.S.C. § 252(i) Competing Carriers Should Be Entitled to the Same Agreements That Are on File at the Department.

The Department's Briefing Questions also ask parties to comment on whether the FCC's "pick and choose" rule should apply to agreements offering unbundled mass market switching. Since the Department issued its Briefing Questions, the FCC modified its interpretation of Section 252(i) and the rules implementing it. Requesting carriers can no longer choose among individual provisions contained in publicly filed interconnection agreements.[79] In a July 13, 2004, decision, the FCC eliminated the "pick and choose" rule and replaced it with an "all or nothing rule."[80] Nevertheless, the issue raised by the Department is still relevant: should "Carrier B" have the right to opt into an agreement that Verizon has reached to provide wholesale services to "Carrier A"? The answer is an unequivocal "yes." It would do little to prevent unlawful discrimination to require the filing of agreements for the provision of mass market switching, if Verizon were not also required to make available those agreements to other requesting carriers.

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[76] *Joint CLEC Petition for a Ruling Relative to the Need for Public Review and Approval by the Commission of the April 3, 2004 Telecommunications Services Agreement Between SBC Texas and Sage Telecom*, Order No. 4, Docket No. 29644 (May 27, 2004).

[77] *Submission of Indiana Bell Telephone Company, Incorporated d/b/a SBC Indiana for Commission Recognition of an Amendment to an Interconnection Agreement Arrived Through Voluntary Negotiations With Sage Telecom, Inc*., Cause No. 41268-InJ123 (June 9, 2004).

[78] *Application for Approval of the Ninth Amendment to the Interconnection Agreement Between Wisconsin Bell, Inc. d/b/a SBC Wisconsin and Sage Telecom, Inc*., Docket 05-TI-1054 (July 23, 2004).

[79] See old Rule 51.809.

[80] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket no. 01-338, FCC 04-164, Second Report and Order (rel: July 13, 2004), ¶¶ 1, 11-24.

It will, however, not suffice to prevent unlawful discrimination merely to require Verizon to make agreements available to requesting carriers. As the FCC made clear in its July 13 decision, state commissions are expected to be diligent in the monitoring and enforcement of the rules implementing Section 252(i). Under an "all or nothing" rule, there is the potential for ILEC abuse. ILECs may include in an agreement provisions unrelated to the business of the other party to the contract simply to make the agreement unacceptable to potential third party carriers who might other request the agreement. The FCC made clear that such "poison pill" tactics by ILECs are unacceptable and that state commissions are expected, "in the first instance, [to] detect such discriminatory practices in the review and approval process under section 252(e)(1)."[81]

Given that the purpose of the agreement-filing requirements of 47 U.S.C. § 271, G.L. c. 159, §§14 and 19, and D.P.U. 90-24 is to prevent discrimination, any agreement that is filed should be available to any requesting carrier.

E. The Department Should Not at Present Establish a Transition Plan to Replace TELRIC-Based Rates with Market-Based Rates for UNEs Affected by *USTA II.*

1. No Pricing Transition Plan Is Appropriate Until a Final Determination Has Been Made That Verizon Will Not Be Required to Provide Access to UNEs Either Under Federal Law or by the Department Acting Under Its Independent State Law Powers.

There is no cause at present for the Department to establish a transition plan to replace TELRIC-based rates with market-based rates for UNEs affected by *USTA II*. The reason is simple: shifting from TELRIC-based rates to some other kind of rates would put the cart before the horse. As the U.S. Supreme Court affirmed in *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), which upheld the FCC's decision to use TELRIC as the basis for pricing UNEs,

[81] Id., at ¶ 29.

UNEs that ILECs must provide pursuant to Section 251 of the Telecommunications Act must be priced on a TELRIC basis. Even if the FCC were to find that unbundled access were no longer required under Section 251, unbundled access to most network elements is required under Section 271 if Verizon is to maintain its privilege to offer interLATA long distance service, and – as is explained below – the Section 271 "just and reasonable" pricing standard approximates TELRIC in the context of the purpose of Section 271. Moreover, if the FCC were to find that unbundled access were no longer required under Section 251, apart from any federal authority under Section 271, the Department would need to determine whether the development of competition in Massachusetts requires that Verizon provide unbundled access at rates based on forward-looking economic cost as a matter of Massachusetts telecommunications policy.

USTA II simply vacated the FCC's subdelegation to state commissions of decision-making authority over impairment determinations under federal law, and vacated and remanded certain of the FCC's nationwide impairment findings.[82] It remains for the FCC to issue new impairment findings – or, in the event that the FCC fails to do so, for this Department to determine whether and under what circumstances Massachusetts CLECs require access to the UNEs on which the Department's questions focus in order to be able to provide local exchange service.

The completely separate question of Verizon's obligations to provide unbundled access under Massachusetts law, in contrast, does not turn on a finding of "impairment," which is a federal law concept. Nothing in Massachusetts law restricts the Department's independent power to require unbundling based on its own view and implementation of state law, including but not limited to the concept of "impairment."

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[82] *USTA II*, 359 F.3d at 594.

Thus, the Department should not establish a transition plan for pricing these elements until either the FCC or the Department itself decides that these network elements need no longer be offered as UNEs pursuant to the Telecommunications Act, and the Department determines that they no longer must be offered as UNEs as a matter of Massachusetts law and policy. . The horse should precede the cart.

It is also inappropriate at this time to establish a transition pricing plan for the UNEs at issue because of the present fragility of competition in the provision of telecommunications services to mass market customers in Massachusetts. Only recently, as a result of the Department's 01-20 proceeding,[83] have Massachusetts CLECs gained the practical ability to compete with Verizon for mass market customers, including small business customers. The cornerstone of their recently acquired ability is their access to UNEs at TELRIC prices. Because of this access, CLECs can do what they could not do before: offer competitively priced, differentiated telecommunications services to small business and residential customers. In fact, since CLECs acquired access to TELRIC-priced UNEs in D.T.E. 01-20, they have achieved modest success in attracting mass market customers.[84] Under current Department policy, Massachusetts consumers have become able to look forward to service improvements, product innovations, and more favorable pricing due to the new and still developing competitive pressures that have come into being. The elimination of TELRIC pricing for mass market switching, UNE-P and dedicated transport would gravely threaten these recent gains.

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[83] D.T.E. 01-20, *Investigation by the Department of Telecommunications and Energy on Its Own Motion into the Appropriate Pricing, Based upon Total Element Long-Run Incremental Costs for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided-Cost Discount for Verizon New England, Inc. d/b/a Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts*.

[84] For example, according to an analysis of UNE-P data from the FCC's June, 2003 report on local competition performed by the Promoting Active Competition Everywhere ("PACE") Coalition, UNE-P-based service represents a 3.8% market share in Massachusetts.

In asking whether it should establish a pricing transition plan for UNEs, the Department observed that proposals to establish such a plan have been floated in other states, such as New York, in the wake of *USTA II*. It is crucial, though, to make a further observation: the establishment of pricing transition plans is far from an overriding goal to state commissions. As its Chairman has indicated, the New York Public Service Commission prefers commercially negotiated resolutions of the uncertainty that *USTA II* has wrought.[85] If, however, Verizon and New York's CLECs cannot achieve such resolutions, Chairman Flynn has stated that his most important goals are (1) ensuring that the economy and consumers of New York are not harmed by the current uncertainty and (2) ensuring that "the more than three million New Yorkers who have come to rely on competitive providers for their telephone service continue to benefit from that choice during this period of uncertainty."[86] Developing a pricing transition plan is very much subordinate to ensuring that the economic and consumer benefits gained through the provision of TELRIC-priced UNEs are not lost.

2. Should a Time Arrive When It Would Be Appropriate to Establish a New Legal Basis for the Pricing of UNEs, the Department Would Have Authority Under Massachusetts Law to Require That They Continue to Be Provided at Long-Run Incremental Cost.

If a time should arrive when it is appropriate for the Department to transition UNE rates from TELRIC-based to market-based standards, the Department would have authority to do so under both federal and Massachusetts law. One predicate for such a transition would, as discussed just above, be a finding that the network elements whose prices are to be transitioned are not subject to the general unbundling obligations of 47 U.S.C. § 251(c)(3), and therefore are

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85 Letter dated March 15, 2004, from New York Public Service Commission Chairman Flynn to FCC Chairman Michael Powell, at 1.

86 *Id*., at 1-2.

not subject to the pricing standards of 47 U.S.C. § 252(d)(1). Under these circumstances, the governing pricing standards would be those established, on the federal side, by 47 U.S.C. §§ 201(b) and 202(a) and, on the state side, by G.L. c. 159, § 14. These statutes all require that Verizon's charges be just and reasonable, and not unjustly or unreasonably discriminatory. Under federal law, any UNEs that Verizon is not required to provide under 47 U.S.C. § 251(c)(3), but that Verizon is required to provide under 47 U.S.C. § 271 as a condition of its right to compete in the long-distance market, are subject at a minimum to the general pricing requirements of 47 U.S.C. §§ 201(b) and 202(a).[87] Thus, charges for these UNEs must be "just and reasonable"[88] and must not reflect "any unjust or unreasonable discrimination,"[89] which principles the FCC recognized as "fundamental" and as applicable to both federal and state ratemaking.[90]

In addition, however, and as discussed above, the Department has independent authority under Massachusetts law to continue requiring Verizon to provide these UNEs at TELRIC-based rates. Massachusetts law requires that "rates, fares [and] charges of any common carrier for any services to be performed within the Commonwealth" shall not be "unjust, unreasonable [or] unjustly discriminatory."[91] Thus, any de-listing of UNEs under federal law would not prevent the Department from promoting competition in the provision of telecommunications services by requiring, under Massachusetts law, the continued provisioning of federally de-listed UNEs at TELRIC-based rates.

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87 *See TRO*, at ¶¶ 656-64; *USTA II*, 359 F.3d at 588-89.

88 47 U.S.C. § 201(b).

89 47 U.S.C. § 202(a).

90 *TRO*, ¶ 633.

91 G.L. c. 159, § 14.

If a time should arrive when it would be appropriate for the Department to establish a new legal basis for pricing UNEs, the Department should take great care in developing such a plan. In light of the crucial importance of TELRIC-priced UNEs to CLECs' ability to compete, it is unlikely that CLECs will be able to continue competing in many markets if they can no longer purchase these UNEs at TELRIC-based rates. Nonetheless, the Department's primary goal in developing any pricing transition plan should be to set terms and conditions for purchasing UNEs that enable CLECs to compete for mass market customers to the greatest extent possible. In addition, CLECs in Massachusetts have made business plans on the assumption that they will be able to purchase the UNEs affected by *USTA II* at TELRIC-based rates, and their customers have purchased services from them based on prices that reflect the CLECs' ability to purchase UNEs at TELRIC-based rates. Any pricing transition plan that the Department may decide to establish should not disturb customers' settled expectations, except in a very graduated manner.

F. The Department Should Proceed With a Hot Cuts Investigation Under Authority of Both State and Federal Law.

The Department has full authority under both state and federal law to require Verizon to provide non-discriminatory, just, and reasonable access to unbundled loops. There is no dispute that under federal law, Verizon is subject to an unbundling requirement for mass market loops, with exceptions related to certain loops not relevant here.[92] There is, equally, no dispute that the Department has authority to implement the federal requirement that mass market loops be unbundled. As the FCC noted in its *TRO*, "even the incumbent LECs agreed that the loop

[92] 47 C.F.R. 51.319; Triennial Review Order ("TRO"), at ¶¶ 199, 211.

network element must be unbundled pursuant to sections 251(c)(3) and 251(d)(2) of the Act."[93] Access to such loops includes the rates, terms and conditions upon which such access is made available. Such rates, terms and conditions necessarily involve the hot cut process and the rates Verizon may charge for loop transfers.

Moreover, the Department's decision in D.T.E. 01-20 requires continued investigation of any and all hot cut processes that potentially meet the requirements the Department established in that docket. Indeed, Verizon has acknowledged its obligation to comply with the Department's directive in D.T.E. 01-20 to offer CLECs a less costly alternative to the current hot cut process.[94] The Department has directed Verizon to provide "an alternative hot cut process that 'would permit CLECs: (1) to minimize service disruption to customers; (2) to reduce or eliminate the need for manual process; (3) to eliminate the need for communications required during the actual cutover; and (4) to purchase a less costly alternative.'"[95] Indeed, the Department made clear that it was interested in considering any type of hot cut process as long as the process met the Department's objectives.[96] A full and complete investigation and adoption of a process that meets the Department's D.T.E. 01-20 objective of a seamless and low-cost process is, therefore, required to comply with prior orders of the Department.

Other states have found, after *USTA II,* that it is in the public interest for them to investigate and establish an efficient, seamless, and low-cost hot cut process that could handle the volumes that could be expected in a world without UNE-P. The California Public Utilities Commission, for example, has ordered the continuation of its hot cut proceeding, concluding

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93 TRO, at ¶ 203.

94 D.T.E. 01-20 (July 11, 2002), at 499-500.

95 D.T.E. 01-20 Letter Order (Feb. 12, 2003), at 2.

96 *Id.*

"that the *vacatur* ordered by *USTA II* does not vacate the need to establish appropriate hot cut processes capable of handling customer migrations among carriers if, or to the extent that, competitive local exchange carriers (CLECs) lose access to unbundled network element (UNE) switching."[97]

In Michigan, SBC had moved to dismiss the hot cut proceeding based on *USTA II*. In denying that motion, the Michigan Public Service Commission stated:

> An examination of *USTA II* does not support SBC's position that the Commission must immediately terminate this proceeding. The focus of the Court's concerns in *USTA II* was on the finding of impairment and on the FCC's sub-delegation to the Commission of the responsibility to determine on a more granular approach whether, in a particular market, there is evidence of non-impairment amongst competing carriers without access to unbundled switching. *USTA II,* slip opinion, p. 22.
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> Because Section 51.319(d)(2)(ii) of the FCC's rules does not delegate to state commissions decision-making authority for impairment determinations and was therefore not vacated, the Commission is required to establish a batch hot cut migration process even if the FCC later makes its own impairment determinations.[98]

But the Michigan Commission's decision did not rest on federal law alone. The Commission found that it had independent authority and responsibility under state law to undertake an investigation and to establish an appropriate hot cut process for a world in which UNE-P is not available. Significantly, it stated:

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[97] *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, Rulemaking 95-04-043, and *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service*, Investigation 95-04-044 (FCC Triennial Review Nine-Month Phase), Assigned Commissioner's Ruling Authorizing Continuation of Batch Hot Cut Proceedings (July 2, 2004), California Public Service Commission, at 1-2.

[98] *In the Matter, on the Commission's Own Motion, to Investigate and to Implement, If Necessary, a Batch Cut Migration Process*, Michigan Public Service Commission, Case No. U-1389, Order Establishing Batch Cut Migration Process (June 29, 2004), at 17-18.

> [T]he Commission is persuaded that acceptance of SBC's position [not to proceed with a hot cut investigation] would place the telecommunications industry in jeopardy of facing a new regulatory paradigm that is expected to result in unprecedented numbers of customer migrations without the means to accomplish the migrations in a timely manner. CLECs that currently provide service to customers through use of UNE-P will need to transition those customers to the CLEC's own switches. … In the Commission's viewpoint, it would be a waste of effort and extremely detrimental to the interests of ILECs, CLECs, and their customers, and contrary to the intent of federal and state law to foster local competition for the Commission to simply abandon this proceeding at this time. Therefore, the Commission finds that SBC's motion to dismiss should be rejected.[99]

Like the commissions in California and Michigan, the Department has a strong interest in ensuring that CLECs have access to unbundled loops on the basis of the most efficient and lowest cost process available, especially in a world where – outside of a cable footprint – there will be *no competition* without such access. Facilities-based local competition will occur only if customers can migrate between facilities-based carriers seamlessly and only if the cost of such migration is not prohibitively high. A low-cost and seamless process is necessary to protect and ensure the competition that the Department has nurtured in Massachusetts for many years. It would be detrimental to the interests of Massachusetts consumers to decline to investigate the need for improved and less costly hot cut processes.

G. Verizon Is Obliged Pursuant to Its Wholesale Tariff to Provide UNEs Under Tariffed Terms and Conditions.

Verizon's obligations under its wholesale tariff are simple and clear: Verizon must provide all UNEs listed there under the terms and conditions of the tariff until such time as the Department revises the tariff. Verizon thus cannot change the pricing for network elements affected by *USTA II* while the current terms and conditions of the tariff remain in effect – this would be true even if the effects of *USTA II* on these elements were clear, which is not the case.

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[99] *Id*., at 18-19.

Verizon's tariffs ensure stability in the offering and pricing of Verizon services and facilities; the tariffs insulate Verizon's customers, including CLECs, from efforts by Verizon to profiteer or to implement precipitate changes in policy. In the *Consolidated Arbitrations* Docket,[100] for example, the Department was not content to rely on Verizon assurances in December, 1999 that it would provide UNE-P voluntarily throughout Massachusetts without any action by the Department.[101] Rather, the Department agreed with AT&T in that docket "that it is unacceptable for [Verizon] to offer [UNE-P] and to have the unilateral right to withdraw it without review by the Department."[102] It explained that "[t]he uncertainty created by such a provision would undermine its value in supporting the development of conditions for a competitive local exchange market in Massachusetts."[103] The Department therefore ordered that Verizon continue to provide UNE-P under the terms and conditions set forth in Verizon's voluntary proposal.[104] The Department emphasized that, because Verizon is obligated to continue to provide UNE-P under its wholesale tariff as well as under its interconnection agreements, Verizon "cannot act unilaterally" to stop providing UNE-P at TELRIC-based rates.[105]

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[100] D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, *Consolidated Petitions of New England Telephone and Telegraph Company, d/b/a Bell Atlantic-Massachusetts, Teleport Communications Group, Inc., Brooks Fiber Communications of Massachusetts, Inc., AT&T Communications of New England, Inc., MCI Telecommunications Company, and Sprint Communications Company, L.P., Pursuant to Section 252(b) of the Telecommunications Act of 1996, for Arbitration of Interconnection Agreements Between Bell Atlantic-Massachusetts and the Aforementioned Companies*.

[101] *Consolidated Arbitrations Docket*, Phase 4-P Order at 6 (January 10, 2000).

[102] *Id.*, Phase 4-P Order at 8.

[103] *Id.*, Phase 4-P Order at 8-9.

[104] *Id.*, Phase 4-P Order at 9, 14.

[105] *Id.*, Phase 4-P Order at 9.

Thus, whatever effect *USTA II* might have on interconnection agreements, all terms and conditions of Verizon's wholesale tariff remain in effect until the Department approves revisions to it.

III. THE DEPARTMENT CAN BEST ENCOURAGE CARRIERS TO ENTER VOLUNTARILY INTO AGREEMENTS WITH RESPECT TO UNEs AFFECTED BY *USTA II* BY ENTERING A STANDSTILL ORDER REQUIRING THE CONTINUED PROVISION OF UNEs UNDER CURRENTLY APPLICABLE TERMS AND CONDITIONS.

In order for carriers to enter into commercially viable agreements with respect to UNEs affected by *USTA II*, both Verizon and CLECs must have incentives to enter into good-faith negotiations to conclude such agreements. As recent actions by Verizon show – most recently, Verizon's attempt last month to revise its wholesale tariff so as to eliminate unbundled switching and UNE-P for use by CLECs in serving certain small business customers in eastern Massachusetts and larger enterprise customers[106] – Verizon appears to lack appropriate incentives to negotiate in good faith with CLECs. If, though, the Department enters a standstill order – as many CLECs (including AT&T) have requested[107] – this will encourage Verizon to

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[106] *See* Verizon's June 23, 2004 tariff filing.

[107] *See*, in D.T.E. 03-60,

- *AT&T's Emergency Motion for an Order to Protect Consumers by Preserving Local Exchange Market Stability* (May 28, 2004);
- *Petition for Expedited Relief* (May 28, 2004) (motion for standstill order of ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts, Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corp. of Massachusetts; Lightship Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc.; segTel, Inc.; and XO Massachusetts, Inc.);
- Conversent's Response in Support of a Standstill Order (June 9, 2004);
- Richmond NetWorx's Letter in Support of Motions for a Standstill Order (June 9, 2004);
- Letter of the Joint Parties in Support of Motions for a Standstill Order (June 10, 2004) (the Joint Parties include A.R.C. Networks, Inc. d/b/a InfoHighway Communications; Broadview Networks, Inc. and Broadview NP Acquisition Corp.; Bullseye Telecom, Inc.; Comcast Phone of Massachusetts, Inc.; DIECA Communications, Inc. d/b/a Covad Communications Co.; DSCI Corp.; Equal Access Networks, LLC; Essex Acquisition Corp.; Global Crossing Local Services, Inc.; IDT America Corp.; Metropolitan Telecommunications, Inc.; Spectrotel, Inc.; and Talk America, Inc.); and
- MCI's Letter in Support of Motions for a Standstill Order (June 10, 2004).

take more seriously the goal of reaching voluntary agreements for the provision of mass market switching, UNE-P, high capacity loops and dedicated transport.

Verizon's recent attempt to eliminate certain of its switching and UNE-P obligations indicates that Verizon is ready to pounce on any opportunity to shed its current obligations. Verizon submitted its tariff filing on June 23, 2004, a mere 8 days after the Department, in a Letter Order accompanying the briefing questions being addressed here, concluded that for now "it is unnecessary" to act on emergency CLEC motions for a standstill order, such as AT&T's. The Department had reached this conclusion based on Verizon's assurance that it would continue to provide all existing UNEs and UNE combinations for at least 90 days.[108] The Department had found that Verizon's 90-day assurance "provides at least short-term resolution to CLECs' concerns," agreed "that a 90-day maintenance of the status quo will allow all parties concerned to focus on continued negotiations," and "urge[d] all parties to continue good faith negotiations that may lead to commercially negotiated agreements."[109] The Department had also requested "further expression of the parties' views on issues raised in both Verizon's and CLECs' responses to the emergency motions," and established a briefing schedule designed to permit the Department to grapple further with these issues during the 90-day abeyance period promised by Verizon.[110]

The tariff filing that Verizon filed only eight days after the Department issued this Letter Order was a blatant attempt to slip through tariff amendments that would eliminate key aspects of UNE-P availability before the Department had the opportunity to investigate whether that is either permitted or desirable. By filing it, Verizon indicated that it had little interest in "good

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[108] *See* Docket D.T.E. 03-60, Letter Order dated June 15, 2004, at 2.

[109] *Id.*

faith negotiations that may lead to commercially negotiated agreements." Rather, Verizon seems determined to strive to squeeze whatever advantages it can out of legal developments even though the effects of those developments are unclear – or, rather, to squeeze advantages out of these developments *before* their effects become clear and *before* the Department can respond to the developments in a manner that may best secure the benefits of telecommunications competition to Massachusetts consumers.

Verizon's efforts to strike while the iron is hot – that is, before legal uncertainties are resolved – should be stopped dead in their tracks by the issuance of a standstill order with respect to UNE provisioning. Not only will this protect consumers by preserving stability in the local exchange market, but it will also enhance the prospects for commercially negotiated resolutions to the legal uncertainties wrought by *USTA II*. By issuing a standstill order, the Department will indicate firmly to Verizon that it cannot count on the disappearance of any unbundling obligations in the near future. Verizon will then have a much greater incentive to negotiate in good faith with CLECs over the terms and conditions for providing UNEs affected by *USTA II*, as well as other UNEs.

IV. THE DEPARTMENT CAN AND SHOULD DETERMINE WHETHER THE BA/GTE MERGER ORDER REQUIRES VERIZON TO CONTINUE TO PROVIDE AT TELRIC THE UNES TO WHICH THE MERGER ORDER APPLIES, BECAUSE THE ISSUE MUST BE RESOLVED IN ORDER TO RULE ON A RIPE AND JUSTICIABLE DISPUTE BEFORE IT.

In many cases before the Department, it routinely interprets rulings, orders, decisions, and rules of the FCC without referring the matter to the FCC for clarification or adjudication. Indeed, the very essence of a UNE cost case, in which the Department must determine the TELRIC costs of an unbundled network element, involves the interpretation of abstract

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[110] *Id.*

statements made by the FCC in decisions and rules; the Department handles such cases without seeking input from the FCC. For example, the Department did not hesitate to interpret what the FCC meant when the FCC stated that state commissions should use

> "a reconstructed local network [that] will employ the most efficient technology for reasonable foreseeable capacity requirements." Local Competition Order at 685. *We interpret that sentence* to refer to the technology, not to the geographic distribution of that technology. We believe that the FCC, in requiring that existing wire centers remain unchanged, was trying to rationalize a forward-looking technology approach to costing with the reality of the physical distribution of existing customers and central offices.[111]

Nor is the foregoing example an isolated one. For example, the Department also stated, "[w]e do not interpret the purpose of TELRIC to insulate Verizon from all uncertainty but rather to incorporate network assumptions based on reasonable adjustments to allow for cost-effective network growth." [112] Indeed, this Department has explicitly asserted its right and authority to reach independent interpretations of FCC rules, independent even from what the FCC might have reached. In D.T.E. 01-20, the Department stated:

> The Department may rely on the analysis or reasoning used by other state commissions and the FCC in its Inputs Order, and may make similar findings based on the persuasiveness of that analysis or reasoning. In other words, any reliance on outcomes from other states or the FCC will be based on the reasoning that led to the outcome, but not on the outcome itself.[113]

There is no basis for the Department not to make an independent decision regarding the meaning of the BA/GTE Merger Order when deciding its meaning is necessary to resolve a dispute that two parties have brought to the Department for adjudication and resolution. Indeed, the Department has a statutory obligation to investigate and adjudicate disputes subject to its

[111] D.T.E. 01-20 (July 11, 2002) ("2002 UNE Cost Order"), at 18 (emphasis supplied), quoting *Consolidated Arbitrations*, Phase 4 Order, at 14.

[112] *Id*., at 98.

[113] *Id*., at 18.

jurisdiction.[114] Moreover, the Department is expected to resolve disputes that arise under interconnection agreements that have been approved by it.[115] Thus, where Verizon seeks to modify an interconnection agreement to eliminate its obligation to provide certain UNEs, based on a change of law provision in such agreement that allows contract reformation only if the change of law is "material" or "materially affects" rights and obligations, it will be necessary for Verizon to demonstrate that the BA/GTE Merger Order does not render immaterial any purported change of law invoked by Verizon. In order to resolve a dispute regarding Verizon's claimed right to modify interconnection agreements based on a "change of law," the Department will necessarily have to address the meaning of the BA/GTE Merger Order.

In summary, the Department has an obligation to adjudicate disputes subject to its jurisdiction that have been brought to it for resolution, and it has routinely done so, even where the resolution of the dispute has involved the interpretation of FCC rules and orders. In none of those cases has the Department required, or sought, FCC clarification before doing so.

V. *USTA II* IS NOT A CHANGE OF LAW THAT REQUIRES REFORMATION OF EXISTING INTERCONNECTION AGREEMENTS.

As discussed extensively in Section I.A., *USTA II* does not change the law because it does not make any finding of non-impairment. Further, nothing in *USTA II* constitutes a finding that Verizon has no obligation under either federal law or Massachusetts law to provide unbundled mass market switching and dedicated transport at TELRIC rates. Because there is no

[114] *See*, Concurring and Dissenting Opinion of Chairwoman Janet Besser, D.T.E. 97-116-C (May 26, 1999), at 21, citing G.L. c. 30A; see also G.L. c. 159, § § 12(d), 16, 19, 20.

[115] *See Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications of Oklahoma, Inc.*, 235 F.3d 493, 497 (10th Cir. 2000) (state commission authority under 47 U.S.C. § 252 "to approve or reject and mediate or arbitrate interconnection agreements necessarily implies the authority to interpret and enforce specific provisions contained in those agreements"); *Southwestern Bell Tel. Co.* v. *Public Utility Comm'n of Texas*, 208 F.3d 475, 479-80 (5th Cir. 2000) (same); *In re Starpower Communications, LLC*, 15 FCC Rcd 11277, 11279-80 (2000) (same); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 946 (8th Cir. 2000) (same).

such change of law, the change of law provisions in Verizon's ICAs do not require any modification to existing ICAs.

In any event, if any party asserts that *USTA II* effects a change of law that requires contract reformation – if, for example, Verizon asserts that after *USTA II* it may stop providing at TELRIC rates UNEs that it previously has provided – this would require an amendment to the obligations provided for in the existing ICAs that could only be implemented in accord with the change of law provisions of those ICAs.[116] Once a party asserts that a change of law has occurred, the ICA requires the parties to attempt negotiation and – failing successful negotiation – to enlist the Department's aid in resolving the dispute.[117] The change of law provisions were included in the ICAs to ensure that neither party could unilaterally cease complying with its obligations based on its own position that the law has changed and no longer requires it to respect those obligations. As discussed in Section I.B., if either party believes that it has a basis under its interconnection agreements for obtaining a modification of its contract obligations based on a purported change of law, that party is bound to follow the ICA procedures for obtaining those modifications. Thus, if Verizon asserts that it can stop providing mass market switching, high capacity loops, dedicated transport and UNE-P as UNEs, it must adhere to the change of law provision in the ICA before any purported changes in its obligations may take hold.

In addition, to the extent that Verizon contends that it can cease providing unbundled access to mass market switching, loops, dedicated transport and UNE-P without claiming a change of law, that dispute remains subject to the dispute resolution procedures provided for in

[116] *See* AT&T's ICA, General Terms and Conditions, Article 7.4; *see also* Teleport's ICA, Article 28.0; ACC's ICA, Article 35.0.

[117] *Id*.

Article 16 of the ICA.[118] The dispute resolution process requires informal negotiation for a designated period of time before the parties may petition the Department to mediate or arbitrate the dispute.[119] Like the change in law provision, the dispute resolution terms in the ICA preclude any party from unilaterally acting upon asserted changes in its contract obligations. Thus, unilateral action by any party is excluded entirely by the change of law and dispute resolution terms of the ICA.

In sum, *USTA II* does not, by itself, change the law in a fashion that relieves Verizon of its unbundling obligations. Moreover, the change of law and dispute resolution procedures do not permit Verizon unilaterally to cease to honor its existing contract obligations based on its own interpretation of a change in law or otherwise. *USTA II*, by itself, does not require any modification to existing interconnection agreements.

VI. THE "JUST AND REASONABLE" STANDARD APPLICABLE UNDER SECTION 271 REQUIRES VERIZON TO PROVIDE "DE-LISTED" UNES AT RATES THAT APPROXIMATE TELRIC LEVELS.

The conditions and requirements of 47 U.S.C. § 271 are voluntarily assumed by a BOC in return for benefits, *i.e.* approval to offer in-region long distance services, that the BOC determines for itself are in its own business interest. The conditions are established to protect the public interest in a competitive long distance market.[120] Such protections are necessary based on

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118 *See also* ACC's ICA, Article 38 and Attachment ADR; Teleport's ICA, Article 29.11.

119 The time period for negotiation of a Non-Service Affecting dispute is 30 days before a party may call upon the Department to resolve the dispute. The Department has 60 days to mediate the dispute, but if at 45 days the parties wish to declare a deadlock, they may request that the arbitrator do so. When the 60 day mediation period runs out without resolution or if deadlock is declared, the parties may then petition for expedited arbitration of the dispute. The time periods allotted for Service Affecting disputes are significantly shorter. *See* AT&T's ICA, Article 16(C).

120 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, CC Docket No. 01-338, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications* Capability, CC Docket No. 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," FCC 03-36, released August 21, 2003 ("TRO"), ¶ 655 ("These additional requirements [the unbundling obligations in the

the well-established understanding, which formed the basis of the Modified Final Judgment breaking up the old Bell System and restricting the right of the BOCs to provide long distance service, that monopoly providers of local services will seek to extend their monopoly into a competitive long distance market. Absent the Section 271 protections, allowing the BOCs to reenter the long distance market and vertically integrate will produce the same anticompetitive results that led to the breakup of the Bell System in the first place. And those results are in fact occurring in the marketplace. In the short time since it received Section 271 authority, Verizon has become the second largest long distance carrier in the entire country. Accordingly, any determination of the appropriate pricing standard for "de-listed" elements under Section 271 must reflect this basic purpose of Section 271.

Section 271, by its terms, does not expressly require any particular pricing standard for de-listed UNEs. The FCC determined in the *TRO* that the rates for the competitive checklist items under Section 271 must be just, reasonable, and nondiscriminatory and must allow for meaningful access:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[121]

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competitive checklist] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market…. The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.").

[121] TRO, ¶ 663, footnotes omitted. It is important to understand that the FCC did *not* conclude in the above paragraph that section 271 network elements were directly subject to sections 201 and 202 of the Act (which applies,

The question that the FCC left open, however, is exactly what the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" means in the context of Section 271.

As we explain below, the Department can and should determine that just, reasonable, and nondiscriminatory rates for de-listed UNEs provided under Section 271 pursuant to interconnection agreements filed for approval in Massachusetts should be based on long run incremental costs. Such a standard protects competition in the bundled local/long distance market and ensures that the prices resulting from competition are the most efficient for Massachusetts consumers.

A. A TELRIC Pricing Standard Is Necessary to Achieve the Basic Purpose Underlying Section 271.

As noted above, the purpose of Section 271 is to protect competition in the long distance market when a BOC is the principal, if not sole, provider of inputs that are essential to both the BOC's own retail operations and the retail operations of its competitors.[122] In the context of bottleneck network elements that both the RBOC's own retail operations and the retail operations of its competitors require, the wholesale rates at which these inputs are offered to competitors must reflect the internal costs that the RBOC incurs in providing these inputs to its own retail operations, and the terms and conditions under which these inputs are offered should not in any respect create a preference or discrimination.[123]

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as the FCC notes, to *interstate* services). Rather, the FCC adopted the just and reasonable rate *standard* that "has historically been applied under most federal and state statutes," and noted that sections 201 and 202 are an embodiment of that traditional standard. The paragraph is not a statement of jurisdiction – i.e., the paragraph does not say that section 271 network elements are interstate services *subject* to 201 and 202. Rather, the passage is describing the appropriate standard of review.

[122] *Cf.* G.L. c. 159, § 19 (common carriers must "regularly and uniformly" extend facilities "to all persons and corporations under like circumstances for the like, or substantially similar, service").

[123] The public policy expressed in the anti-discrimination requirements of Sections 271, and 201 and 202, have deep roots. Where a single entity, such as Verizon, has property or facilities that both it and its competitors need to provide service to the public, the entity may not gain a competitive advantage by discriminating against its rival in

In a competitive market, it is assumed that a firm will produce inputs in an efficient manner. As explained by Professor John Mayo in testimony filed in Docket D.T.E. 01-31, it is a well-established principle of economics that long run incremental cost best reflects such internal production costs.[124] Accordingly, in the context of setting nondiscriminatory wholesale rates for network elements provided to competitors, the cost basis for such rates should be the long run incremental cost of those elements. This is the approach of "Total Element Long Run Incremental Cost," or "TELRIC" pricing.[125]

The establishment of efficient (cost-based) TELRIC rates for Section 271 elements is the best method for protecting retail-stage competition in the market for bundled local and long distance service. As Professor Mayo explained:

> Properly established TELRIC rates establish parity in the prices paid by the incumbent firm for efficiently provided inputs that it supplies to itself and the prices paid by its competitors. In this way, both the incumbent and new entrants are made to operate "on a level playing field" in the retail stage of the telecommunications market in Massachusetts.[126]

(continued...)
the provision of such property. *See: United States v. Terminal Railway Association of St. Louis*, 224 US 383, 411, 32 S Ct 507, 516, 56 L Ed 810 (1912) (use of a critical railroad bridge owned by a group of railroad companies must be made available to unaffiliated competing railroad companies "upon such just and reasonable terms and regulations as will, in respect of use, character, and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies.")

[124] *Investigation by the Department on its own motion into the appropriate regulatory plan to succeed price cap regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts' retail intrastate telecommunications services in the Commonwealth of Massachusetts*, D.T.E. 01-31 ("*Verizon Alternative Regulation*"), Testimony of John W. Mayo on Behalf of AT&T Communications of New England, Inc., filed August 24, 2001 ("Mayo 01-31 Testimony"), p. 39 ("The price of access, like the prices of all services provided by an incumbent regulated monopolist . . . should ideally be set equal to the long-run marginal (or incremental cost of providing that service. *Marginal costs provide the unequivocal economic benchmark for efficient pricing in virtually all market settings*.") (emphasis added).

[125] *Id*. ("In the telecommunications industry . . . marginal costs have generally been approximated by the concept of total element long-run incremental cost, or TELRIC.") *See also Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 122 S.Ct. 1646, 152 L.Ed.2d 701, (2002).

[126] Mayo 01-31 Testimony., p. 12.

Efficient, cost-based pricing for elements provided pursuant to Section 271 is the best means for preventing many anticompetitive strategies and tactics available to the monopoly provider of inputs to new entrants competing against the monopoly in the downstream markets.

Prior to Verizon's entry into the Massachusetts long distance market under Section 271, efficient cost-based pricing of inputs was not essential – although it would have been more efficient – to protecting competition in the downstream bundled local and long distance market. Verizon had no incentive to discriminate against downstream providers, and those providers all faced the same cost for their inputs, albeit an inefficient one. Now, however, following Verizon's Section 271 approval, it competes in that downstream long distance market, and therefore has a clear incentive to engage in anticompetitive conduct. Moreover, Verizon's ability to successfully engage in such conduct has increased as well.

Professor Mayo has explained the ability of upstream monopolies, like Verizon, in such situations to reduce or eliminate competition in the downstream markets, as follows:

> Where firms attempting to enter a market are forced to compete with a vertically integrated incumbent supplier that holds monopoly power over a necessary input that is priced substantially above cost, a variety of opportunities for anticompetitive exclusionary behavior on the part of the incumbent are presented. For example, a simple price-cost squeeze may be implemented where the incumbent charges a mark-up of output price over the input price that renders entry by non-integrated suppliers unprofitable. In the case at hand, Verizon can hold the margin between toll rates and access charges sufficiently low that interexchange carriers find competing in the toll market becomes unremunerative.
>
> In addition, the monopoly profits collected by the incumbent supplier can be used as a "war chest" to protect its market position against the threat of entry. For example, war chest funds can be used to support other, more highly targeted responses to entry threats through individual contracts negotiated with high-volume (and, therefore, relatively price-sensitive) customers. Due to the excess profits received from the sale of access services to its competitors, the ILEC can afford to undercut its rivals in these negotiations. Again, regulators may attempt to prevent the ILEC from putting these funds to such uses through application of imputation-like controls; but, again, such attempts are unlikely to be fully successful.

> The simple point is that, where the incumbent enjoys a stream of excess profits from the sale of a monopolized input, it has opportunities to employ those profits in anticompetitive ways against its rivals who suffer artificially inflated costs. While regulators may attempt to prevent the firm from using these funds in this way, such attempts are not likely to be completely successful. The ingenuity of the regulated firm along with the myriad exclusionary strategies that potentially may be implemented make the chances that regulatory "fixes" will succeed extremely remote.[127]

The principal objective of Section 271 is to ensure that, if RBOCs are permitted to enter the long distance market, they cannot use their monopoly control over the inputs required by competitors to stifle once thriving competition in that market. If Verizon were permitted to price Section 271 elements above their long run incremental cost, it would force new entrants to pay not only for the costs that their utilization of the ILEC's facilities imposes on the ILEC but also an additional "tribute" to the incumbent firm. This pricing discrimination creates a wedge between the costs incurred by the incumbent and the cost imposed on new entrants.[128] This cost asymmetry creates a barrier to entry that Section 271 is designed to prevent.

Having voluntarily pursued the right to compete in the downstream market for its own private interests under Section 271, Verizon must comply with the Section 271 conditions necessary to protect competition in the downstream market. As demonstrated above, if that market is to be protected, one of the conditions must be the offering of essential network elements at TELRIC-based prices.

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[127] *Id*., pp. 41-43 (footnotes omitted).

[128] In the absence of discrimination concerns, there may well be a range of potential rates that would be "just and reasonable." However, where a subset of such otherwise just and reasonable rates would be anti-competitive in effect, a federal agency must select a rate that also does not work a discrimination, even if the discrimination is due in part to non-jurisdictional factors. *Federal Power Commission* v. *Conway Corp*., 426 U.S. 271, 96 S.Ct. 1999 (1976). Since Verizon, in most instances, is the only entity that has distribution facilities that both it and its CLEC competitors need to provide many telephony services, Verizon's distribution network constitutes "essential facilities" and wholesale rates to competitors must not be greater than the cost that Verizon itself incurs in providing the same facilities to its own retail operations.

B. A TELRIC Pricing Standard Ensures That Massachusetts Consumers Will Not Pay Prices Above Efficient Levels.

In addition to ensuring parity, *i.e*., nondiscrimination, between the costs of bottleneck inputs faced by the incumbent and the new entrants, establishing input prices at TELRIC based levels confers another benefit: according to economists, prices set at long run incremental costs are unequivocally and indisputably the most efficient and stable for maximizing economic welfare over the long run. Efficient prices for telecommunications inputs produce two economically desirable results: (1) they ensure that consumers of the inputs and of the retail stage products do not pay more than the resources required to produce that which is purchased, thus maximizing social welfare; and (2) they protect against uneconomic bypass.

When the prices of telecommunications inputs exceed the true cost of production, "the effect is to discourage [telecommunications] customers from placing calls that have social values that are greater than their [true] associated costs."[129] As a result, suboptimal use of the telephony network is fostered by artificially high prices. As Dr. Mayo, explained, the social welfare losses historically caused by the above cost pricing of access charges have run in the billions of dollars annually on a national basis.[130] While the exact amount of social welfare losses cannot be estimated with specificity, the losses are real and tangible. They represent actual consumer benefits forgone. Moreover, the above-cost premiums in the prices of the retail services that customers do purchase end up in the pocket of Verizon, because they flow from the above-cost pricing of the inputs that only Verizon controls. They are a classic "monopoly rent" that Verizon

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[129] *Id*., p. 38.

[130] *Id*., p. 38.

extracts from Massachusetts consumers.[131] In this sense, they are a very real wealth transfer from Massachusetts consumers to Verizon.

Prices set at levels above long run incremental cost also encourage uneconomic bypass. To the extent that competitors are required to pay above the true incremental cost of the inputs required to provide service, it will force them to incur even greater costs to construct their own access facilities. If they are able to remain in the market at all, they will necessarily be forced to charge higher prices to recover their investments, thus insulating Verizon from competition that could drive prices down to Verizon's incremental cost. Verizon, thus, continues to enjoy a monopoly rent while others are forced to make uneconomic and unnecessary investment, an investment for which Massachusetts consumers ultimately pay.

In sum, Section 271 prescribes a set of conditions intended to ensure that, where RBOCs elect to benefit themselves by entering into the long distance market, they do not adversely affect the public interest by reducing or eliminating competition in the bundled local/long distance market. In order to accomplish the purpose of Section 271, therefore, TELRIC based pricing for Section 271 elements must be one of those conditions.

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[131] As Dr. Mayo describes it, "Where these charges exceed costs, substantial inefficiencies are created, resulting in unnecessary costs that, ultimately, must be borne by Massachusetts consumers. Stated another way, where these charges exceed costs, no amount of competition will be effective in driving down the price that consumers pay to efficient levels." Mayo 01-31 Testimony, p. 12.

Respectfully submitted,

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Appendix

DEPARTMENT BRIEFING QUESTION	AT&T Brief Section	AT&T Brief Pages
When the *vacatur* takes effect, what are Verizon's obligations with respect to mass market switching, UNE-P, high capacity loops, and dedicated transport under applicable federal law, giving effect to any change of law provisions in carriers' interconnection agreements? What is the appropriate role for the Department, if any, under federal law when the vacatur takes effect?	I.	1-14
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: What are Verizon's obligations to provide such UNEs under Massachusetts law?	II., II. A.	14-19
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: Do Verizon's obligations as carrier of last resort require it to offer UNEs? See Intra-LATA Competition, D.P.U. 1731, at 76 (1985).	II. B.	19-20
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: Do the terms of Verizon's Alternative Regulation Plan indirectly require it to continue providing mass market switching, UNE-P, dedicated transport, and high-capacity loops at TELRIC rates, and if so, what would be the consequences should Verizon discontinue providing any of the above TELRICbased rates?	II. C.	20-23

In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: If carriers reach agreement on terms for mass market circuit switching, may or must those agreements be filed with the Department as interconnection agreements for approval under 47 U.S.C. § 252? May or must those agreements be filed with the Department for approval as customer specific arrangements? See AT&T Communications of New England, Inc., D.P.U. 90-24 (1990). Would such terms be subject to the federal pick and choose rule? 47 U.S.C. § 252(i).	II. D.	23-32
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: Should the Department establish a transition plan to replace TELRIC-based rates for mass market circuit switching, UNE-P, high capacity loops, and dedicated transport with just and reasonable market-based rates, as has been proposed in other states, such as New York, and if so, what should be the parameters of such a plan? See, e.g. In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271, N.Y.P.S.C. Case 04-C-0420. What authority would the Department have to do so?	II. E.	32-37
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: Should the Department proceed with a separate hot cuts investigation under state law? If so, may the record already compiled in D. T.E. 03-60 be incorporated into such a proceeding? Would the scope of such an investigation and standard of review of proposed hot cut processes be different from the investigation in D.T.E. 03-60?	II. F.	37-40
In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport: What are Verizon’s obligations pursuant to its wholesale tariff?	II. G.	40-42

What steps, if any, should the Department take to encourage carriers to enter voluntarily into agreements with respect to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport that promote efficiency, fairness, rate continuity, and earnings stability for all parties?	III.	42-44
Should the Department seek a declaratory ruling from the FCC as to whether the BA/GTE Merger Order requires Verizon to continue to provide mass market switching, UNE-P, dedicated transport, and high capacity loops at TELRIC?	IV.	44-46
Is the D.C. Circuit Court's decision in USTA II a "change of law" affecting carriers' existing interconnection agreements?	V.	46-48
Does § 271 of the Telecom Act require Verizon either directly or indirectly, by virtue of the trade-offs under the Act, to continue to provide de-listed UNEs at TELRIC?	VI.	48-55